United States Court of Appeals

for the Second Circuit

APPELLANT BRIEF REHEARING

77-1062

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1062

B
P/S

UNITED STATES OF AMERICA,
Respondent,

—v.—

GINO REDA,
Defendant-Petitioner,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA ON REHEARING

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Preliminary Statement

On August 22, 1977 this Court granted Gino Reda's petition for rehearing and requested both parties to file their comments on the effect of the Supreme Court's recent decision in *United States* v. *Chadwick*, U.S. , 97 S.Ct. 2476 (June 21, 1977).

Indictment 76 Cr. 873, filed September 3, 1976, charged Gino Reda and his son Louis Reda in four counts with violations of the federal narcotics laws. Count One charged the defendants with a conspiracy to possess and distribute cocaine, in violation of Title 21, United States Code, Section 846. Count Two charged the defendants with distributing 0.69 grams of cocaine on August 24, 1976. Counts Three * and Four charged the defendants

* Count Three is the only count arising from the search challenged on this petition for rehearing.

with possessing with intent to distribute approximately one-half pound and one pound, respectively, of cocaine on August 26, 1976, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and Title 18, United States Code, Section 2.

Judgment of conviction was entered in this case on January 7, 1977, in the Southern District of New York following separate and joint jury trials before the Honorable Charles E. Stewart, United States District Judge.** Gino Reda was sentenced on each count to three years' imprisonment followed by three years' special parole, to run concurrently. This Court heard oral argument of the Redas' appeals on May 17, 1977 and affirmed the judgments from the bench. The mandate was issued on May 20, 1977.

Gino Reda is currently in custody serving his sentence.

Statement of Facts

From mid-July to the end of August, 1976, Gino Reda met on several occasions with John Tufo, an informant, and several Drug Enforcement Administration ("DEA") agents working undercover. At one of these meetings, while negotiating to sell cocaine, Gino Reda removed cocaine from a cardboard box and showed it to Tufo at Louis' apartment at 1910 Hone Avenue in the

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** Gino Reda was tried separately and convicted on Counts One, Three and Four in November, 1976. The jury was unable to reach a verdict on Count Two. Gina Reda was then retried on Count Two at a joint trial with Louis Reda, his son and co-defendant. On December 30, 1976 the jury convicted Gino Reda on Count Two and Louis Reda on Counts One and Four. Louis Reda was acquitted on Counts Two and Three.

Bronx. (Tr. 40-46, 462-64; GX 2C, 14, 17, 17A).* Gino also delivered a sample of cocaine to the agents and sought to ship a package of cocaine to Florida. (Tr. 46-51, 233-39; GX 1, 18, 18A).**

On August 25, 1976, the day before Gino Reda's arrest, Tufo learned from Reda that he was discontinuing the negotiations with the undercover agents and that he would send the cocaine back to his Florida source through the Eastern Airlines "Sprint" delivery service. On the evening of August 25th, when the agents learned of Gino Reda's change in plans, they obtained arrest warrants for both Redas and a search warrant for Louis Reda's apartment. (Tr. 51-52, 247, 482).

On the morning of August 26, 1976, surveillance agents observed Gino leave Louis' house and enter his green Cadillac. He carried the brown box described by the informant. After stopping at a store, Gino drove to LaGuardia Airport, where he parked his car and walked towards the terminal, still carrying the cardboard box. At that time, DEA Agents Kennedy and Forget arrested him, and Kennedy seized the taped brown box. (GX 2C). After routine processing at DEA headquarters, Gino was taken to the United States Attorney's Office, where Agent Kennedy conferred with Assistant United Staes Atorney Kelleher and opened the box. He found a white plastic bag containing approximately one-half pound of cocaine (GX 2), a small note rolled with $1,050 (GX 2A), and, a second note rolled with $300 (GX 2B). (Tr. 619-24; GX 2, 2A, 2B, 2C).

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* Page references to the official transcript of Gino Reda's first trial are abbreviated "Tr." Government Exhibits are referred to as "GX."

** The Government respectfully refers the Court to the Statement of Facts contained in the Brief for the United States of America filed on the initial appeal for a more complete review of the facts.

That same day Louis Reda was arrested outside his apartment at 1910 Hone Avenue, and the apartment was searched pursuant to the warrant. Various narcotics paraphernalia was seized at that time as well as approximately one pound of cocaine found inside a black attache case.

ARGUMENT*

POINT I

The Warrantless Search of the Cardboard Box Seized From Reda at the Time of His Arrest Was Lawful. *United States* v. *Chadwick* is inapplicable to This Case, Which Involves a Search Incident to a Valid Arrest.

The contents of the brown box seized from Reda's person at the time of arrest were properly admitted into evidence against him by Judge Stewart, who correctly held that the warrantless search of the box was incident to Reda's arrest. The Supreme Court's opinion in *United States* v. *Chadwick*, U.S. , 97 S.Ct. 2476 (June 21, 1977) does not affect the propriety of that ruling

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* Even if this Court should conclude that *Chadwick* requires the suppression of the cocaine seized from the cardboard box, all that would be required under the circumstances of this case is the vacating of the judgment of conviction on Count Three of the Indictment—the only count relating to the cocaine from the taped cardboard box. Counts One, Two and Four remain untainted by any such defect. Since Judge Stewart imposed a three year sentence on each count, all sentences to run concurrently, this Court should decline to review the issues raised by Reda on this petition for rehearing and affirm his conviction. *Barnes* v. *United Sttaes*, 412 U.S. 837, 848 n.16 (1973); *United States* v. *Gaines*, 460 F.2d 176, 178-80 (2d Cir.), *cert. denied*, 409 U.S. 88[illegible] (1972); *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir.), [illegible]*t. denied*, 400 U.S. 849 (1970).

because the search in *Chadwick* simply was not a search incident to the arrest of the defendants in that case. *United States* v. *Chadwick*, 532 F.2d 773, 780-81 (1st Cir. 1976), *affirming*, 393 F. Supp. 763, 774-75 (D. Mass. 1975).

Gino Reda's arrest, pursuant to a valid arrest warrant, occurred in an airport parking lot. At the time of arrest, the agents seized a small brown cardboard box from under his arm. There can be no doubt on these facts that a warrantless search of the box at that time and place would have been lawful:

> "There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

Likewise, because the agents lawfully could have searched the box at the scene of arrest, they were justified in removing the box from the scene of arrest and waiting until a more reasonable opportunity existed at the United States Attorney's Office for a search and inventory of its contents:

> "It is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." *United States* v. *Edwards*, 415 U.S. 800, 803 (1974).

Thus, in a *per curiam* opinion, *United States ex rel. Muhammad* v. *Mancusi*, 432 F.2d 1046, 1047 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971), this Court upheld the search at the FBI offices of a briefcase seized

from an arrested bank robber at the time of arrest as being incident to his arrest. The Court properly considered the briefcase to be among the defendant's "personal effects" in his immediate possession at the time of arrest. This Court has consistently followed its holding in *Mancusi, supra. United States* v. *Chiu*, 522 F.2d 330 (2d Cir. 1975); *United States* v. *Edmonds*, 535 F.2d 714 (2d Cir. 1976),* and other Courts of Appeals have agreed. *United States* v. *Battle*, 510 F.2d 776 (D.C. Cir. 1975); *United States* v. *Buckhanon*, 505 F.2d 1079, 1082 (8th Cir. 1974); *United States* v. *Ciotti*, 469 F.2d 1204, 1206-07 (3d Cir. 1972), *vacated on other grounds*, 414 U.S. 1151 (1974); *United States* v. *Mehciz*, 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971).

As with the briefcase in *Mancusi, supra*, the box taken from Gino Reda in this case was property in his immediate possession and clearly within the *Chimel* perimeter of access. The locked footlocker in *United States* v. *Chadwick, supra*, was not such property and thus could not lawfully have been searched without a warrant either at the point of arrest or later when in safekeeping. Accordingly, because *Chadwick* does not involve a search incident to arrest, whereas this case does, *Chadwick* has no bearing on the District Court's findings here.

In *Chadwick*, the defendants were arrested in Boston after removing a 200-pound, double-locked footlocker from a train. After a specially trained dog had detected the presence of a controlled substance inside the footlocker the agents observed the defendants place the footlocker in the trunk of a car. With the car trunk still open, the DEA agents arrested the defendants, who were standing by and seated in the car. The agents then drove the car, with the footlocker in the trunk, to the

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* Judge Stewart specifically held below that *Mancusi* was dispositive (Tr. 117-20, November 1, 1976).

federal building in Boston. There a large quantity of marihuana was discovered an hour and a half later when the footlocker was unlocked and searched without a search warrant. The Court held that under these circumstances a search warrant was required before the federal agents could open the locked footlocker which they had seized.

In *Chadwick*, the Court determined that a warrantless search of the footlocker was unreasonable because there was no exception to the warrant requirement of the Fourth Amendment which would justify such action. The Court found a lack of exigent circumstances, and that the "automobile exception" did not apply. *Id.*, 97 S.Ct. at 2483-84 The Court also noted that both at the time of the seizure and the later search, the footlocker was not within the area of the defendants' immediate control, as that is defined in *Chimel* v. *California, supra. Chadwick* v. *United States, supra*, 97 S.Ct. at 2480.

Any analysis of the Supreme Court's opinion in *Chadwick* must include examination of the holdings of both the District Court and the Court of Appeals for the First Circuit. Both courts recognized that a search of hand-carried luggage or personal effects (such as Reda's box) would be proper at the scene of arrest or later at the DEA office, but held that it was unreasonable to include the 200-pound double-locked footlocker in that category. *United States* v. *Chadwick*, 532 F.2d 773, 780 (1st Cir. 1976), *affirming*, 393 F. Supp. 763, 775 (D. Mass. 1975). In this context, it must be remembered that the Supreme Court in *Edwards* had sustained the post-arrest search and seizure of the defendant's clothing and had recognized the propriety of a seizure and search of personal property found with a defendant at the time of arrest. *United States* v. *Edwards, supra*, 415 U.S. at 803.

Nothing in *Chadwick* purports to overrule *Edwards*, expressly or by implication. Indeed, *Chadwick* creates no new law, but merely recognizes that established excep-

tions to the warrant requirement are not met by the facts of that case. In terms applicable to this case, the Court noted that the footlocker could not be considered as "personal property . . . immediately associated with the person of the arrestee . . ." *Id.*, 97 S. Ct. at . Other cases, including the lower court opinions in *Chadwick*, *have* included items of the type seized in the instant case in that category. *See Abel* v. *United States*, 362 U.S. 217, 239 (1960); *United States* v. *Chiu*, *supra; United States* v. *Edmonds*, *supra; United States* v. *Battle*, *supra; United States* v. *Buckhanon*, *supra; United States* v. *Ciotti*, *supra.* Considering these judicial definitions of property which may properly be searched incident to arrest, without a warrant, at places other than the site of the arrest, *Chadwick* cannot be viewed as dispositive of the instant case.

Finally, Chief Justice Burger's opinion in *Chadwick* must be interpreted in the context of its procedural posture and the arguments presented to the Court. *Chadwick* came to the Court on petition for certiorari sought by the Government from an affirmance of the District Court's suppression of the contraband. The Government sought to establish a new exception to the Fourth Amendment's warrant requirement in order to justify the warrantless search of the trunk. The Government argued that no warrant is required to search movable personalty seized in a public place when there is probable cause to believe it contains evidence of a crime. The Supreme Court rejected this novel Fourth Amendment position and, finding no traditional exception to the warrant requirement applicable, affirmed. The defendants did not seek, nor should any dicta in Chief Justice Burger's opinion be read to create drastic limitations on the scope of time-honored exceptions to the warrant requirements. The "incident to arrest" exception remains, and is clearly applicable to the facts of this case.

POINT II

United States v. *Chadwick* should not be applied retroactively.

In the event that this Court holds that *United States* v. *Chadwick*, *supra*, is dispositive on the facts of this case, a result we argue vigorously should not be reached, that decision should not be applied retroactively to a warrantless search conducted prior to the Supreme Court's decision. While, *Chadwick* does not purport to announce new law, if this Court chooses to read *Chadwick* as requiring suppression of the cocaine in this case then it would be applying *Chadwick's* dicta as a new standard for judging the reasonableness of warrantless searches incident to arrest.

A three-fold test has developed since the Supreme Court first began to grapple with the problem of retroactivity in criminal cases. Retroactive application of a new decision depends upon (1) the purpose to be served by the new decision, (2) the extent of reliance upon the previous law by the Government, and (3) the effect on the administration of justice. *Halliday* v. *United States*, 394 U.S. 831, 832 (1969); *Desist* v. *United States*, 394 U.S. 244, 249 (1969); *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967). Consideration of each of these factors supports the Government's posiiton that *Chadwick* should not be applied retroactively to this case. Certainly on balance retroactive treatment is inappropriate.

The purpose of the *Chadwick* decision stems from the constitutional provision it interprets. The Fourth Amendment's reasonableness standard and the warrant requirement protect legitimate interests in privacy. The exclusionary rule has been devised by the courts to deter law enforcement officers from ignoring the Fourth Amendment's safeguards. Retroactive application of *Chadwick* to this case will not further the deterrence func-

tion of the exclusionary rule.* Obviously the agents and the Assistant United States Attorney who opened and searched Gino Reda's cardboard box could not have been encouraged to abide by unarticulated Fourth Amendment principles. The Supreme Court has recently recognized that Fourth Amendment cases are particularly inappropriate for retroactive application:

> "It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application. [Citation omitted.] *United States* v. *Peltier*, 422 U.S. 531, 535 (1975).

Relying on *Peltier*, the Fifth Circuit has recently held that, whatever its effect, *Chadwick* may not be applied retroactively, in light of the arresting officer's good faith reliance on prior law. Finding the retroactivity question dispositive, the Court did not address the merits of *Chadwick*. *United States* v. *Montgomery*, F.2d , Dkt. No. 76-3219, slip op. at 5528 (5th Cir., August 29, 1977).

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* Admittedly the agents had the time to secure a search warrant, had they only known that they needed one in this case. The agents certainly demonstrated their predisposition to comply with the dictates of the Fourth Amendment as is evidenced by the fact that a search warrant was secured for the search of Louis Reda's house.

Moreover, application of the exclusionary rule in the circumstances of this case will not serve to sufficiently promote its objective of deterrence to justify other consequences and costs to society. Plainly in this case the agents adhered closely to the letter of the law as it stood at the time that they acted. To now exclude evidence secured by such exemplary conduct in this and other cases will serve only to let the guilty go free, without enhancing the deterrence necessary to safeguard the Fourth Amendment's dictates.

The second factor to be considered on the question of retroactivity is the law enforcement officers' reliance on prior law. As noted earlier, this Court has repeatedly upheld the subsequent warrantless search of such items as briefcases and packages seized from the defendant's possession incident to his lawful arrest. Thus, in *United States ex rel Muhammad* v. *Mancusi*, 432 F.2d 1046, 1047 (2d Cir. 1970) (per curiam), *cert. denied*, 402 U.S. 911 (1971) this Circuit rejected as "entirely frivolous" the defendant's claim that the briefcase found in the possession of the defendant and seized at the time of his arrest, was improperly opened and examined later that day at FBI headquarters. The Court stated:

> "Officers may indeed promptly conduct more thorough searches of an arrested person and of the personal effects in his possession at the time of his arrest at a more convenient place than the spot of arrest."

See also, United States v. *Chiu*, 522 F.2d 330 (2d Cir. 1975); *United States* v. *Edmonds*, 535 F.2d 714 (2d Cir. 1976).*

The last prong of the test is "the effect on the administration of justice of a retroactive application" of *Chadwick*. It is difficult to predict with great accuracy the number of post-trial or post-appeal claims that would be raised by prisoners whose convictions were based in whole or in part on evidence lawfully seized at the time of arrest and shortly thereafter searched without a warrant. Aside from the potentially overwhelming number of actions that might be brought if *Chadwick* were given retroactive force, many of the records are apt to be unclear on the precise timing of the search of a lawfully

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* The law was so clear on this point that on May 17, 1977 this panel affirmed the judgment of conviction in this case from the bench.

seized package, container, suitcase or trunk. Further, the burden on the courts likely to be generated by retroactive application of *Chadwick* is all the more unjustified since the issue does not touch the guilt or innocence of the defendants at all.

In sum, under the test adopted by the Supreme Court to determine the retroactive, effect of a decision, *Chadwick* should be applied, if at all, only to searches occurring after the announcement of that decision, June 21, 1977.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Robert N. Shwartz being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 9th day of September, 1977 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Gino Reda
03824-158
Box 600
Eglin Air Force Base
Florida 32542

And deponent further says that he sealed the said envelope and placed the same in the mailbox drop for

Robert N. Shwartz

Sworn to before me this
9th day of September 1977

Olga C. Grampp

OLGA C. GRAMPP
Notary Public New York State
No. 43-4620836
Qualified in Richmond Cty.
Comm. Expires March 30, 1979